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80-1973

SUPREME COURT OF THE UNITED STATES

October Term 1980

No. _____

HON. HENRY D. HOPSON
HON. RICHARD C. OLDHAM
HON CHARLES H. ANDERSON
HON. S. RUSH NICHOLSON and
HON. GEORGE H. KUNZMAN - - Petitioners

versus

COMMISSIONERS OF THE SINKING FUND
OF THE CITY OF LOUISVILLE - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY AND APPENDIX

FRANK E. HADDAD, JR.
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May 15th, 1981

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Does the City of Louisville threaten the independence of the judiciary and deny these Petitioners Due Process of Law by imposing an occupational tax upon the Circuit Court Judges of Jefferson County, Kentucky, as a condition precedent to the judges' constitutionally mandated obligation to conduct their court in Jefferson County.

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2– 6
Statement of the Case	6– 8
Reason for Granting the Writ	8–20
Conclusion	20
Appendix	21–43
Appendix A (Opinion of the Jefferson Circuit Court)	21–28
Appendix B (Opinion of the Court of Appeals of Kentucky)	29–35
Appendix C (Concurring Opinion of Chief Justice Palmore of the Supreme Court of Kentucky)	36–38
Appendix D (Dissenting Opinion by Justice Lukowsky of the Supreme Court of Kentucky)	39–41
Appendix E (Opinion and Order of the Supreme Court of Kentucky denying discretionary review)	42–43

TABLE OF AUTHORITIES

Constitutional Provisions: PAGE

Constitution of the Commonwealth of Kentucky, Sections 109, 112 ..... 2–3, 9, 19

United States Constitution, Fourteenth Amendment 2, 8

Statutes:

Federal Statute: 28 U.S.C. §1257(3) 2

Miscellaneous:

City of Louisville General Ordinance 727 et seq... 3–6, 9–11, 15, 16, 17, 19

Cases:

City of Louisville v. *Sebree,* 308 Ky. 420, 214 S. W. 2d 248 (1948) 12

City of Newport, et al. v. *Klatch, et al.,* 189 Ky. 300, 224 S. W. 844 (1920) 18

Frick v. *Pennsylvania,* 69 L. Ed. 1058, 1062, 268 U. S. 488, 489 (1925) 8

Follett v. *McCormick,* 321 U. S. 573, 577, 88 L. Ed. 938, 941 (1944) 19

Louisville Provision Co. v. *Glenn,* 187 F. Supp. 423 (1937) 18

Murdock v. *Pennsylvania,* 319 U. S. 104, 114, 87 L. Ed. 1292, 1299 (1943) 19

Portland Van & Storage Co. v. *Hoss,* 139 Or. 434, 9 P. 2d 122 (1932), 103 A.L.R. 20 13

Reif v. *Barrett,* 355 Ill. 104, 188 N. E. 889 (1933), 103 A.L.R. 22 15

Re Skelton Lead & Zinc Co.'s Gross Production Tax, 81 Okla. 134, 197 P. 495 (1921) 103 A.L.R. 21 16

Shannon, et al. v. *Streckfus Steamers, Inc.,* 279 Ky. 649, 131 S. W. 2d 833 (1939) 13

Reynolds Metals Co. v. *Martin,* 269 Ky. 378, 107 S. W. 2d 251 (1937) 19

UPREME COURT OF THE UNITED STATES

October Term 1980

No. _____

HON. HENRY D. HOPSON
HON. RICHARD C. OLDHAM
HON. CHARLES H. ANDERSON
HON. S. RUSH NICHOLSON and
HON. GEORGE H. KUNZMAN - - *Petitioners*

v.

COMMISSIONERS OF THE SINKING FUND
OF THE CITY OF LOUISVILLE - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioners respectfully pray that a Writ of Certiorari issue to review an opinion and Order of the Court of Appeals of Kentucky entered in this proceeding on January 18, 1980.

OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky has not been reported as of yet. A motion for Discretionary review was granted by the Supreme Court of Kentucky on July 8, 1980. On February 17, 1981, the Supreme Court of Kentucky issued a new opinion withdrawing its previous Order granting discretionary review.

JURISDICTION

The Opinion and Order of the Supreme Court of Kentucky vacating their previous Order granting discretionary review was entered on February 17, 1981. This Court's jurisdiction is invoked pursuant to 28 U. S. C. §1257(3).

QUESTION PRESENTED

Does the City of Louisville threaten the independence of the judiciary and deny these Petitioners Due Process of Law by imposing an occupational tax upon the Circuit Court Judges of Jefferson County, Kentucky, as a condition precedent to the judges' constitutionally mandated obligation to conduct their court in Jefferson County.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States of America provides in pertinent part as follows:

> . . . [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . .

The Constitution of the Commonwealth of Kentucky, sections 109 and 112 provide as follows:

> Sec. 109 The judicial power; unified system; impeachment

The judicial power of the Commonwealth shall e vested exclusively in one Court of Justice which hall be divided into a supreme Court, a Court of Appeals, a trial court of general jurisdiction known s the circuit court and a trial court of limited urisdiction known as the district court. The Court shall constitute a unified judicial system for peration and administration. The impeachment powers of the general assembly shall remain inviolate. (Enacted 1974 S. 183, eff. 1-1-76)

ection 112 provides in part as follows:

(1) *Circuit court shall be held in each county.*

(2) The Circuit court districts * * * shall continue under the name "judicial circuits," the general assembly having power upon certification of the necessity therefor by the Supreme Court to reduce, incorporate or rearrange the judicial districts * * *.

(3) The number of circuit judges * * * shall continue, the general assembly having power upon certification of the necessity therefor by the Supreme Court to change the number of circuit judges in any judicial circuit. [Emphasis Added.]

eneral Ordinance No. 727 et seq. enacted by the d of Aldermen of the City of Louisville provides levant part as follows:

727.01 DEFINITIONS.

(h) "Employer" shall mean an individual, * * * governmental body or unit or administration or agency * * *, who or that employs one or more persons on a salary * * *.

(i) "Licensee" shall mean any person required hereunder to file a return or to pay a license fee thereon under this chapter. * * *

727.02 ON WHOM IMPOSED: AMOUNT.

(a) On and after January 1, 1959, every person, association, corporation or other entity engaged in any occupation, business, trade profession or other activity in the City shall pay into the Sinking Fund an annual license fee *for the privilege of engaging in said activities,* which license fee shall be measured by one and one-fourth (1¼) per cent of (a) all salaries, wages, commissions and other compensation earned by every person in the City for work done or services performed or rendered in the City; and (b) the net profits of all businesses, professions or occupations from activities conducted in the City. (1958 G.O.Sec. 67.1.)

(b) In addition to the annual license fees required elsewhere by law, on and after January 1, 1975, every person, association, corporation, or other entity engaged in any occupation, business, trade, profession or other activity in the City shall pay into the Sinking Fund an annual license fee for the privilege of engaging in said activities, which license fee shall be measured by one-fifth of one per cent (⅕%) of (a) all salaries, wages, commissions and other compensation earned by every person in the City for work done, or services performed or rendered in the City; and (b) the net profit of all businesses, professions or occupations from activities conducted in the City. (Ord. 168-1974, Approved 12-24-74.)

(c) All occupational license fees, plus any applicable interest and penalties, received by the Com-

oners of the Sinking Fund pursuant to Sec-
1 of this Ordinance, together with any such
pts from a corresponding occupational license
nposed by the County of Jefferson, Kentucky,
alaries, wages, commissions, other compensa-
and net profits earned within Jefferson
ty, Kentucky, outside of the Corporate Limits
e City of Louisville, Kentucky, less a fixed
ge for services rendered in the amount of
of the net receipts thereof, shall be paid
monthly into, and pending disbursement be
in, a separate and special trust fund identi-
as the Mass Transit Trust Fund to be used
y and only for the purposes of Mass Trans-
ation Program approved by the electorate of
erson County, Kentucky, November 5, 1974,
as provided in Chapter 169 of the 1974 Acts
e General Assembly of Kentucky, being addi-
l sections of Chapter 96A of the Kentucky Re-
l Statutes (Ord. 168-1974 approved 12/24/74).

04 WITHHOLDING.

n employer who employs one or more persons
in the City shall deduct * * * the license
due from each employee measured by the
unt of salaries * * * due by said employer
aid employee, and shall pay to the Commis-
ers of the Sinking Fund the amount of the
ise fee so deducted. * * *

10 REGULATIONS: ENFORCEMENT.

The Commissioners of the Sinking Fund are
eby charged with the enforcement of the pro-
ons of this chapter, *and are empowered to pre-
be, adopt, promulgate and enforce rules and*

ılations relating to any matter or thing per-ing to the administration and enforcement of provisions of this chapter, including but not ted to provisions for the re-examination and ection of returns as to which an over-payment nder-payment is claimed or found to have been le, and *the rules and regulations promulgated them shall be binding upon all licensees and loyers affected.* . . . [Emphasis added.]

STATEMENT OF THE CASE

Board of Aldermen of the City of Louisville an occupational license tax ordinance (General ce 727), which imposed an annual license fee privilege of engaging in any occupation, busi-de or any other activity in the City.

Petitioners, five of the Circuit Judges of the h (30th) Judicial District, brought an action Jefferson Circuit Court, Eleventh Division, ing the authority of the Board of Aldermen ity of Louisville to impose, through General ce No. 727, an annual tax or license fee for ilege of engaging in the necessary activities to be performed by them in conducting Cir-rt within the City of Louisville.

Opinion rendered on June 21, 1978, the Trial rrectly pointed out that the precise issue in nt case, whether the City of Louisville or other alities have the right to license circuit court, court, Court of Appeals or even Supreme dges, had never been addressed by the Appel-rts of Kentucky. [Appendix A, p. 26]

Court held that the City of Louisville was
ority to license the Petitioners since the
ad derived their license or privilege to
e Judicial Amendment to the Kentucky
Sections 109-124, the vote of the elec-
e commissions issued by the Governor of
der K.R.S. 61.020. [Appendix A, p. 26]
rt held that General Ordinance No. 727
ing measure for the privilege of doing
hough the ordinance was enacted to raise
ce, to require circuit court judges to be
on the City for a license to do that which
been mandated by the Constitution of
s indeed unrealistic. [Appendix A, p. 27]
ondent appealed this decision to the Court
Kentucky's intermediary court, who then
Trial Court. The Court of Appeals rea-
e license tax imposed no threat to the in-
f the judicial system but, rather, was only
oducing revenue. [Appendix B, p. 33]
rt held that the Trial Court had errone-
upon the license concept in their decision,
uisville ordinance was merely an occupa-
imed only at producing revenue. [Appen-
]
tioners then filed a Motion for Discretion-
in the Supreme Court of Kentucky. That
granted on July 8, 1980, and both Peti-
Respondent submitted Briefs. On Feb-
981, after hearing oral arguments on the
ion, the Supreme Court of Kentucky ren-

Opinion and Order vacating their previous anting discretionary review. The Court rea- at discretionary review had been improvi- anted. [Appendix E, p. 42] Both a dissenting by Justice Lukowsky [Appendix D] and a ng opinion by Chief Justice Palmore [Appen- vere issued in response to the Court's Order their previous Order granting discretionary

EASON FOR GRANTING THE WRIT

t Can Now Decide for the First Time an Issue of me Importance to the Judiciary of Each State of ation by Holding That It Is a Fundamental Vio- of the Due Process Clause of the United States itution for a City's Board of Aldermen to Impose cupational Tax Upon Circuit Court Judges as a ition Precedent to the Judges' Constitutionally lated Obligation to Conduct Their Court in That

Court has long recognized that the exaction by f a tax which it is without power to impose is of property without Due Process of Law in of the Fourteenth Amendment of the United onstitution. *Frick* v. *Pennsylvania,* 69 L. Ed. 62, 268 U. S. 488, 489 (1925). Likewise, it hat a city Board of Alderman's exaction of an onal tax upon Circuit Court judges, which it it authority to impose, is a taking of property Due Process of Law in violation of the Four- mendment of the United States Constitution. entire case boils down to the simple fact that rd of Aldermen of the City of Louisville vio-

itioners' right to Due Process of Law
d not have the authority to impose an
ax upon these Petitioners as a condition
he Petitioners' constitutionally mandated
conduct their court in Jefferson County.
al amendment to the Constitution of the
h of Kentucky, Section 112, mandates
Court shall be held in each county. The
rovides in relevant part as follows:

uit court shall be held in each county.
Circuit court districts * * * shall
under the name "judicial circuits," the
ssembly having power upon certification
cessity therefor by the Supreme Court to
ncorporate or rearrange the judicial dis-
* *.

number of circuit judges * * * shall
the general assembly having power upon
ion of the necessity therefor by the Su-
Court to change the number of circuit
any judicial circuit. [Emphasis Added.]

Constitution of the Commonwealth of
es not allow for any obstruction or condi-
t to the Petitioners' constitutional duty to
uit Court.

Petitioners' contention that the Board of
enactment of General Ordinance No. 727
ents just such an obstruction to the Peti-
titutional duty to conduct Circuit Court.
inance No. 727 imposes an annual license

fee upon all persons engaging in any occupation, trade, or other activity in the City of Louisville.

727.02 On Whom Imposed: Amount.

(a) On and after January 1, 1959, every person, association, corporation or other entity engaged in any occupation, business, trade, profession or other activity in the City shall pay into the Sinking Fund an annual license fee for the privilege of engaging in said activities, which license fee shall be measured by one and one-fourth (1¼%) per cent of (a) all salaries, wages, commissions and other compensation earned by every person in the City for work done or services performed or rendered in the City; and (b) the net profits of all businesses, professions or occupations from activities conducted in the City. (1958 G.O. Sec. 67-1.)

(b) In addition to the annual license fees required elsewhere by law, on and after January 1, 1975, every person, association, corporation, or other entity engaged in any occupation, business, trade, profession or other activity in the City shall pay into the Sinking Fund an annual license fee for the privilege of engaging in said activities, which license fee shall be measured by one-fifth of one per cent (⅕%) of (a) all salaries, wages, commissions and other compensation earned by every person in the City for work done, or services performed or rendered in the City; and (b) the net profit of all businesses, professions or occupations from activities conducted in the City. (Ord. 168-1974, Approved 12-24-74.)

Section 727.08 requires that every person conducting a business in the City of Louisville shall apply to the

Commissioners of the Sinking Fund for an occupational license fee reporting number before the commencement of such occupation.

> 727.08 REGISTRATION REQUIRED.
>
> Every person conducting a business as defined in this chapter shall apply to the Commissioners of the Sinking Fund for an occupational license fee reporting number, before the commencement of such business. (Ord. 175-1974. Approved 1/14/75.)

It is clear from the above language of the Ordinance that, whether classified as a license or occupational tax, General Ordinance No. 727 was designed to regulate or control the right to engage in a given occupation within the City of Louisville. This regulatory ordinance violates the Petitioners' right to Due Process of Law since it attempts to regulate that which has been constitutionally mandated.

The independence of the members of the judiciary was of paramount importance to the drafters of the judicial amendment to the Kentucky Constitution. By imposing a tax and by forcing the Petitioners to register for a reporting number before allowing them the privilege of conducting their Court, General Ordinance No. 727 has jeopardized the judicial independence that was so very important to the drafters of the Constitutional Amendment.

In its Opinion rendered January 18, 1980, the Court of Appeals of Kentucky reversed the Trial Court's ruling that the Petitioners were not liable to pay the

license tax imposed by General Ordinance No. 727. That Court stated that the Trial Court had erroneously relied on a definition for "license tax" that had been taken out of context from *City of Louisville* v. *Sebree,* 308 Ky. 420, 214 S. W. 2d 248 (1948). [Appendix B, p. 33] The Trial Court had held that under *Sebree,* a license was in the nature of a specific privilege and that it confers on a person the right to do something which otherwise he would not have the right to do.

> This Special Judge agrees with the argument of plaintiffs in their Response to Defendants' Brief that a license is in the nature of a specific privilege and that, as stated in *Sebree, supra,* it "confers on a person the right to do something which otherwise he would not have the right to do." This right, as defined in the cases cited herein, is the privilege of working in the City of Louisville, or in the case of circuit judges, it is specifically the privilege of conducting circuit court. [Appendix A, p. 26]

The Court of Appeals held that the license concept was inapplicable to the instant case, since the ordinance had not been aimed at regulating but, rather, was enacted as an occupational tax, merely designed to raise revenue.

> The lower court apparently founded its exemption upon the license concept, which, as we have pointed out, is an erroneous concept. There was no threat herein, as envisioned by the lower court, to the independence of the judicial system as created under the Judicial Article and the "one

Court of Justice" concept therein. *If this ordinance, in any manner, sought to base its existence on the privilege of the courts of this state to do business,* sought to regulate them in any way, or threatened revocation of a privilege as punishment for noncompliance, this Court would not hesitate to declare it invalid. However, *this ordinance is simply a revenue measure, imposing an occupational tax,* and in this respect the judges of this Commonwealth are no different than the federal employees in the case of *Patrick* v. *City of Frankfort,* Ky., 539 S. W. 2d 275 (1976). [Emphasis Added.] [Appendix B, p 33]

Petitioners submit that there is no clear line of demarcation between a license tax and occupational tax. *Shannon, et al.* v. *Streckfus Steamers, Inc.,* 279 Ky. 649, 131 S. W. 2d 833 (1939). In fact, an occupational tax is a tax on the exercise of the right or privilege of carrying on a business in the nature of a license.

> As implied by the name itself, an occupation tax, being upon the right or privilege of carrying on a business, vocation, trade, or calling, is not a property tax, *but a tax on the exercise of the right or privilege in the nature of a license or exercise tax. . . .*
>
> * * *
>
> A property tax constitutes a burden upon business to the extent of the tax; *But an occupation tax, with its ancillary provisions, if not paid, may bring to an end the business altogether.* [Emphasis Added.] *Portland Van & Storage Co.* v. *Hoss* (1932) 139 Or. 434, 9 P. 2d 122, 103 A.L.R. 20.

An occupational tax either regulates and controls a given business or occupation or imposes a tax for the privilege of exercising a given occupation, trade or profession. Most important is the fact that the payment of the tax itself is a condition precedent to the privilege of carrying on a business or occupation. This is true, even though no license in form is issued, since the payment of the tax is the license under the authority of the city or state which allows an individual to engage in his (her) respective occupation.

> *On the other hand, an occupation tax has one of two missions: Either to regulate and control a given business or occupation, or to impose a tax for the privilege of exercising, undertaking, or operating a given occupation, trade, or profession.* Its effect is to license a person engaged in a given calling or occupation. *A license in form may not be issued to a taxpayer, but the payment of the tax is the license under the authority of the state to engage in such occupation.* Regulation is not a necessary adjunct of an occupational tax. It may or it may not be. *The payment of the tax itself is a condition precedent to the privilege of carrying on a business or occupation. The payment of the tax is made mandatory, by the act creating it, upon the right of the individual to follow the given occupation.* An occupation tax may be levied under the general police powers of the state, where its purpose is to *regulate* or control a given occupation, or it may be levied under the general sovereign powers of the state, where its sole purpose is to *raise revenue.* Under which power it is levied makes no difference as to the character of the tax.

[Emphasis Added.] *Reif* v. *Barrett* (1933) 355 Ill. 104, 188 N. E. 889. 103 A.L.R. 22.

In a dissenting opinion to the Court's order vacating their previous order granting discretionary review, Justice Lukowsky of the Supreme Court of Kentucky correctly noted that the bottom line is that the occupational tax imposed by General Ordinance No. 727 is a tax levied on the "privilege" of engaging in any occupation, business, trade or profession within the City of Louisville.

A number of seemingly inconsistent observations may be made about occupational license taxes in Kentucky:

D. They are revenue measures. Martin, supra. *However, the bottom line is that they are no more and no less than taxes levied on the "privilege" of engaging in any occupation, business, trade or profession within the geographical boundry of the unit of government imposing the tax. Patrick* v. *City of Frankfort,* Ky., 539 S. W. 2d 275 (1976); 2 Debates of the Constitutional Convention 2793 (1890). [Emphasis Added] [Appendix D, p. 40]

It is immaterial that this tax is based on a percentage of an individual's income, since it cannot be disputed that the tax is levied on the "privilege" of engaging in a given occupation in the City of Louisville and has as its primary purpose the regulation of the business affected.

The mission of a license tax, occupational tax, or privilege tax, or by whatever name this species

of tax may be called, is always to regulate a given business, or control the right to engage in a given occupation. It is imposed as a condition or as an element of the conditions upon the right to exercise a given privilege, its primary mission being to regulate and control; and while the tax itself may not always be the sole condition, *yet its payment is invariably made a part or a factor in the conditions upon which a business may be conducted,* by the statute under which such tax is levied. *In other words, the primary object and purpose of every statute which levies an occupation tax is to regulate the conduct of the business affected.* [Emphasis Added.] *Re Skelton Lead & Zinc Co's Gross Production Tax,* 81 Okla. 134, 197 P. 495 (1921) 103 A. L. R. 21.

In addition to upholding the validity of the tax on the basis that the tax was simply a revenue measure, the Court of Appeals of Kentucky held that the tax imposed by General Ordinance No. 727 presented no threat to judicial independence. In fact, the Court noted that it would have declared the ordinance invalid if it had even attempted to regulate or threatened revocation of a privilege for non-compliance.

> There was no threat herein, as envisioned by the lower court, to the independence of the judicial system as created under the Judicial Article and the "one Court of Justice" concept therein. If this ordinance, in any manner, sought to base its existence on the privilege of the courts of this state to do business, *sought to regulate them in any way, or threatened revocation of a privilege as punishment for noncompliance,* this Court would

not hesitate to declare it invalid. [Emphasis added.] [Appendix B, p. 33].

Petitioners submit that the Court of Appeals rea-ning above is erroneous. General Ordinance No. 727 es, in fact, threaten judicial independence by grant-g the Commissioners of the Sinking Fund unlimited thority to enforce its provisions. Section 727.10 pro-les in relevant part as follows:

> 727.10 REGULATIONS: ENFORCEMENT.
>
> The Commissioners of the Sinking Fund are hereby charged with the enforcement of the provisions of this chapter, *and are empowered to prescribe, adopt, promulgate and enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this chapter,* including but not limited to provisions for the re-examination and correction of returns as to which an over-payment or under-payment is claimed or found to have been made, and *the rules and regulations promulgated by them shall be binding upon all licensees and employers affected.* . . . [Emphasis added.]

other words, the Commissioners have unlimited thority to take whatever steps necessary to enforce e payment of the tax. They can choose to simply force the $100.00 penalty outlined in section 727.99 might opt to prescribe a more drastic measure such seeking an injunction to prohibit the Petitioners from nducting their Court until the license tax has been id. In addition, the Commissioners might choose to ercise the ultimate authority that is necessarily

plied in their power to grant a license to engage in given occupation, that being, the revocation of that ense. It is this awesome power of the Commissioners the Sinking Fund which threatens the very inde-ndence of the judiciary that was so very important the drafters of the Constitution of the Common-alth of Kentucky.

The statement that the power to tax involves the wer to destroy, or some close variance, finds frequent petition in the decisions of our courts. It has been d that where the legislature has the full power of xation, there is no constitutional objection to exacting discouraging tax rate as the alternative to giving up business. 71 Am. Jur. 2d, State and Local Taxation, c. 73, pp. 398-399. Where the constitutional power given to tax, it has no limits. It carries with it in-rently the power to embarrass and destroy. *Louis-lle Provision Co.* v. *Glenn,* 187 F. Supp. 423 (1937).

It was aptly put in the case of *City of Newport, al.* v. *Klatch, et al.,* 189 Ky. 300, 224 S. W. 844, (1920) herein the court, speaking through Justice Thomas, ated as follows:

> It is a trite saying that "the power to tax is the power to destroy," and it must be conceded that the tendency of the time lends credence to the truth of that saying. It is therefore necessary for the protection of the citizen that the authority for the assessment and collection of taxes should clearly appear, and that all essential requisites for conferring that authority should be at least substantially observed." *Id.* at p. 846.

Court has long recognized the above principles
that the power to tax the exercise of a privi-
ge power to control or suppress its enjoyment.

to repeat, "the power to tax the exercise of
ivilege is the power to control or suppress its
yment. [Citation omitted.] *Follett* v. *Mc-*
mick, 321 U. S. 573, 577, 88 L. Ed. 938, 941
44).

e authority given Respondent by Section 727.10
General Ordinance, the Commissioners of the
Fund have the power to destroy and are, in
e to control and suppress the Petitioner's con-
ally mandated duty to conduct their Court.

tioners do not question the City of Louisville's
y to enact an occupational tax for the privilege
ging in certain occupations within the city limits
sville. However, the Respondent has overlooked
he most important and fundamental exceptions
nicipality's power to tax, that being, that the
pality's power to tax may be exercised without
xcept to the extent that it may be prohibited or
by the state's constitution or the federal consti-
Reynolds Metals Co. v. *Martin,* 269 Ky. 378,
W. 2d 251 (1937). Appeal dismissed, 303 U. S.
S. Ct. 146, 82 L. Ed. 502. *Murdock* v. *Pennsyl-*
319 U. S. 104, 114, 87 L. Ed. 1292, 1299 (1943).
oners submit that the tax imposed by General
ance No. 727 is prohibited by Section 112 of the
tution of the Commonwealth of Kentucky since
ection of the Constitution mandates that Circuit

t be held in each county. The Constitution
mmonwealth of Kentucky simply does not al-
yment of an occupational tax as a condition
to the fulfillment of its constitutional di-

CONCLUSION

ersing the Trial Court, the Court of Appeals
cky violated the Petitioners' right to Due
of Law as guaranteed by the Fourteenth
nt of the United States Constitution. The
by the Court of Appeals is contrary to the
date of the Constitution of the Commonwealth
cky. For the reasons hereinabove stated, this
for Writ of Certiorari should be granted.

Respectfully submitted,

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2600 Citizens Plaza
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Counsel for Petitioners

APPENDIX

APPENDIX A

FERSON CIRCUIT COURT

DIVISION ELEVEN, CIVIL BRANCH

No. 232242

Topson, Judge;
Oldham, Judge;
Anderson, Judge;
cholson, Judge;
Kunzman, Judge;
Ferson Circuit Court,
Judicial Circuit of Kentucky - *Plaintiffs*

ers of the Sinking Fund,
sley, Secretary-Treasurer;
Meyers;
Wetterer;
vey I. Sloane;
E. Mershon - - - - *Defendants*

ENT AND DECLARATION OF RIGHTS—
Entered July 5, 1978

urt, having made its separate Findings of Fact
sion of Law which are the basis of the Judg-
he Court, being of the opinion that relief should
the Plaintiffs,

ow Ordered and Adjudged as follows:

t the statutes KRS 92.281 and 82.090, and Gen-
ance 727 of the City of Louisville, as they might
efferson circuit judges and to the named Plain-
s, are unconstitutional, void and unenforceable,

's are not required to comply with the terms
ns thereof;

the Defendants, Commissioners of the Sinking
ficers and members, and each of them, their
ervants, are hereby permanently restrained and
n exercising any of the powers, rights or duties
ne enforcement of said ordinance against the
ofar as it purports to cover such rights, powers
pon said Defendants and each of them;

said ordinance is not voided in any wise other
ified in this Judgment; and

Plaintiffs recover of the Defendants their costs
ded.

day of June, 1978.

(s) C. Warren Eaton
Special Circuit Judge
Jefferson Circuit Court
Civil Branch, Division Eleven

A. Logan
y Home Life Building
entucky 40202

F. Matthews
Stites, III
Doll, Matthews and Boone
ational Tower
entucky 40202

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN, CIVIL BRANCH

No. 232242

HENRY D. HOPSON, Judge;
RICHARD C. OLDHAM, Judge;
CHARLES H. ANDERSON, Judge;
S. RUSH NICHOLSON, Judge;
GEORGE H. KUNZMAN, Judge;
JUDGES, Jefferson Circuit Court,
THIRTIETH JUDICIAL CIRCUIT OF KENTUCKY - *Plaintiffs*

v.

COMMISSIONERS OF THE SINKING FUND,
ROY H. OWSLEY, Secretary-Treasurer;
WILLIAM D. MEYERS;
ROBERT H. WETTERER;
MAYOR HARVEY I. SLOANE;
CREIGHTON E. MERSHON - - - - - *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed July 7, 1978

This is an action brought by plaintiff, as a declaratory judgment action pursuant to KRS 418.040.

The plaintiffs, Henry D. Hopson, Richard C. Oldham, Charles H. Anderson, S. Rush Nicholson and George H. Kunzman are duly elected, qualified and acting Judges of the Jefferson Circuit Court, Thirtieth Judicial Circuit of Kentucky.

The defendant, "Commissioners of the Sinking Fund," composed of the members named in the caption, is an official governmental body organized under and pursuant to KRS 91.130.

At issue is the liability of plaintiffs, as circuit judges, for payment of occupational or license taxes to the defendant under General Ordinance 727 of the City of Louisville.

Plaintiffs contend that the City is not authorized to require them to pay a tax for the privilege of engaging in the necessary activities required of them in conducting circuit court within the city, and that such statutes, ordinances or laws implying or specifically declaring their income as judges taxable for this privilege are unconstitutional.

Defendant contends otherwise, and states that "serving as a judge clearly constitutes engaging in an occupation or a profession and therefore . . . the plaintiffs must be subject to its local license taxes" levied by the City on every person engaged in a "business, trade, occupation or profession" in the city and county, there being no exemption for judges from this tax.

Section 181 of the Constitution of Kentucky, the section from which cites and counties derive the power to levy license fees if such powers are delegated to them by legislative act, provides that the General Assembly "may, by general laws, delegate the power to counties, towns, cities and other municipal corporations to impose and effect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

By Chapter 131 of the Acts of 1948, the General Assembly enacted KRS 92.281, which in subsection (1) authorized all cities "to levy and collect any and all taxes provided for in Section 181 of the Constitution of the Commonwealth of Kentucky, and to use the revenue therefrom, for such purposes as may be provided by the legislative body of the city."

Pursuant to this Act, KRS 92.281, the City of Louisville enacted General Ordinance 727, an Occupational License

Tax Ordinance, which in Section 727.02(a) provided, "On and after January 1, 1959, every person, association, corporation or other entity engaged in any occupation, business, trade, profession or other activity in the City shall pay into the Sinking Fund an annual license fee for the privilege of engaging in such activities. . . ."

The validity of occupational tax ordinances, in the present form of the Louisville ordinance, has been upheld by the Kentucky Court of Appeals, now the Kentucky Supreme Court, in *City of Louisville, et al.* v. *Sebree, et al.*, 308 Ky. 420, 214 S. W. 248 (1948); *Cook, et al.* v. *Commissioners of Sinking Fund of City of Louisville*, 312 Ky. 1, 216 S. W. 2d 328 (1950); *Commissioners of Sinking Fund* v. *Howard*, Ky., 248 S. W. 2d 340 (1952); and *Patrick* v. *City of Frankfort*, Ky., 539 S. W. 2d 275 (1976). The dominant issue in these cases was the contention of the taxpayers that the tax was an income tax rather than a licensing tax, and therefore void since cities cannot impose income taxes. In upholding the tax in *Sebree, supra*, the court, although recognizing that the tax did embody features of an income tax, held that the ordinance "lays the tax upon the privilege of working and conducting a business within the city, and only measures the value of the privilege by the amount of earnings of net profits."

The *Howard* and the *Patrick* cases, *supra*, questioned the right of cities to collect license taxes from federal employees who were exempt by federal law from having to be licensed. The cities took the position that under the Buck Act, 4 USC 106(a) and 110(c), the tax was one against income, which was authorized under the act. The court agreed, apparently holding that since federal law permitted the imposition of income taxes, that the license tax was any authorized income tax under the Buck Act. Thus, the ordinances are applied to federal employees as an income tax, and to all other employees as a license tax.

This inconsistency was recognized in a separate affirming minority opinion in the *Patrick* case, *supra.*

Nevertheless, the validity of the tax as an occupational or license tax is not the issue here. The question in this case, and one which has not been faced by an appellate court in this state, is whether, under the authority of Section 181 of the Constitution and by reason of the Act of the General Assembly in KRS 92.281, the City of Louisville or other municipalities have the right to license circuit judges and, for that matter, district court of appeals or supreme court judges, who derive their "license" or privilege to act both from the Judicial Amendment to the Kentucky Constitution, Sections 109-124, and by virtue of such legislative laws as might be authorized by or of rules of practice and procedure enacted by the Supreme Court of Kentucky.

This Special Judge agrees with the argument of plaintiffs in their Response to Defendants' Brief that "a license is in the nature of a specific privilege," and that, as stated in *Sebree, supra,* it "confers on a person the right to do something which otherwise he would not have the right to do." This right, as defined in those cases cited herein, is the privilege of working in the City of Louisville, or in the case of circuit judges, it is specifically the privilege of conducting circuit court. Yet, this is a privilege specifically granted to circuit judges throughout the Commonwealth, not only by the Constitution and by the vote of the electorate, but by virtue of the commissions issued by the Governor of Kentucky under KRS 61.020. Even though the ordinance was enacted as a revenue measure with no regulatory provisions, it is in fact a licensing measure for the privilege of doing work, and, as noted by plaintiffs, unless the license fee is paid, it must follow that the City "would have the authority to prohibit the circuit judges from conducting circuit court. . . ." This result cannot be

and for this and other reasons, the court must declare that plaintiffs are exempt from the license required generally of all workers under the ordinance.

We are impressed favorably with the argument that under the separation of powers provisions of the Constitution, and by virtue of the Judicial Amendment thereto, we have now created and established an independent judicial system consisting of one Court of Justice. Section 109 of the Constitution provides, ". . . The Court shall constitute a unified judicial system for operation and administration. . . ." This "one Court of Justice" must of necessity be free and independent of other branches and departments of government in order not to be influenced by, controlled by or interfered with in the conduct of its judicial functions. Circuit courts must be free and independent of ordinances, laws or regulations enacted by the City of Louisville. These judges must, in many cases wherein the City is a party, declare its rights. To require them to be dependent on a city license for the privilege of determining the rights of the City seems indeed unrealistic. It is in effect causing the courts (judges) to be subservient to the City as a possible litigant. In order to maintain the independence of the judicial system, judges should not be subject to license taxes, and for this further reason, the plaintiffs must be exempt therefrom.

Argument is made that an excise tax, to be constitutional, must apply to all persons who are in the same class, so that there will be no discrimination between taxable subjects in the one class. Plaintiffs argue that there now being one Court of Justice under the Constitution, all judges now are in one class, or at least all 87 circuit judges constitute a separate class. Thus, to permit the excise taxing of judges in Louisville, while the majority of other circuit judges are not being so taxed, transgresses the constitutional provisions of equality and uniformity in tax-

ation of both the United States Constitution and the Constitution of Kentucky. Although this argument is meritorious, in that the tax makes the office of circuit judge less attractive financially in Jefferson County than in perhaps all counties elsewhere, it is not found to be determinative of the validity of the ordinance. Other employees similarly situated statewide might also suffer the same financial disadvantage.

The conclusion reached herein is that the ordinance is invalid as to these plaintiffs and other circuit judges in Jefferson County because, as noted, the City has no authority to license judges, and furthermore under the separation of powers, doctrine and the necessity of maintaining an independent and unified one court system, control or licensing by other branches of government is prohibited.

No method is made of KRS 82.090 since this statute adds nothing to KRS 92.281, which is all-inclusive as to all persons subject to this license tax. As judges are not taxable under KRS 92.281, which is the holding of this court, neither are they taxable by virtue of the enactment of KRS 82.090.

This 26th day of June, 1978.

(s) C. Warren Eaton
Special Circuit Judge
Jefferson Circuit Court
Civil Branch, Division Eleven

APPENDIX B

OPINION RENDERED: JANUARY 18, 1980
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 78-CA-1240-MR

COMMISSIONERS OF THE SINKING FUND
OF THE CITY OF LOUISVILLE - - - *Appellant*

v.

HON. HENRY D. HOPSON
HON. RICHARD C. OLDHAM
HON. CHARLES H. ANDERSON
HON. S. RUSH NICHOLSON
HON. GEORGE H. KUNZMAN - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable C. Warren Eaton, Special Judge
Civil Action No. 232242

REVERSING—Received January 18, 1980

BEFORE: GANT, COOPER and WILHOIT, Judges.

GANT, Judge. This action was brought by appellees, five of the circuit judges of the 30th judicial district, seeking a declaratory judgment pursuant to KRS 418.040. The sole question presented is whether the appellees are liable for the payment of the occupational tax levied by the City of Louisville pursuant to General Ordinance 727 of that city. The lower court held that appellees were exempt. We reverse.

ection 181 of the Constitution of Kentucky provides, pplicable part:

The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions.

RS 92.281 authorizes the cities of this state to levy collect all taxes provided for in Section 181 of the stitution and KRS 82.090 provides as follows:

Cities may impose occupational taxes on state officers and employees except elected officers paid on per diem basis.—(1) The legislative boards or councils of the cities of this Commonwealth are hereby severally authorized by ordinances applying to occupations generally to impose occupational taxes *upon all state employees and officers whether appointive or elective,* for services performed therein, except those elected officers who are paid on a per diem basis. (Emphasis added).

(2) Except as provided in subsection (1) of this section, no person shall be relieved from liability for any occupational license tax levied for revenue purposes by any legislative board or council of a city of this Commonwealth by reason of his carrying on his occu-

ation or performing services on any state property
area within the bounds of such city.

addition to statutory authority, the rights of cities
occupational taxes on its citizens have been specifi-
upheld by the court. In the case of *City of Louisville*
ree, 308 Ky. 420, 214 S. W. 2d 248 (1948), the occupa-
tax was declared constitutional. In the case before
e lower court seized upon an excerpt from that case
of a "license tax" and utilized a definition from the
e case, holding "that a license is in the nature of a
e privilege and that as stated in *Sebree, supra,* it
rs on a person the right to do something which other-
ne would not have the right to do'." This definition
ted out of context. Commissioner Stanley, in *Sebree,*
ughly distinguished between a license tax and an occu-
al tax in the following language, at page 428:

pecifically or technically speaking, a license means to
onfer on a person the right to do something which
herwise he would not have the right to do—a special
rivilege rather than a right common to all persons.
imports regulation. A "license fee" implies the im-
osition or exaction on the right to exercise a business
rivilege. That term is used exclusively in the ordi-
ance, which also specifically deals with peddlers, pool
ooms, taxi cabs and other occupations commonly re-
uiring a license. Such a "license fee" may be imposed
ither under the police power for the purpose of regu-
ation or the taxing power for the purpose of revenue
r both. (Citing authorities). *It is apparent that the*
resent ordinance was enacted as a revenue measure.
ince the levy is primarily for revenue, to speak with
echnical accuracy, the tax imposed is an occupation
ax. It lays a pecuniary burden for the support of the
unicipal government—the revenues being expressly

cated first to the Sinking Fund and the balance to General Fund of the City.

courts have previously discussed this obvious dif- In the case of *City of Henderson* v. *Lockett,* 157 , 369, 163 S. W. 199 (1914), we find the following:

ill thus be seen that the city may, in the exercise of police power, license and regulate automobiles . . . ere a license fee is exacted as a revenue measure, er statutory authority based upon section 181 of Constitution, the courts will not interfere with the rcise of that power unless the action is arbitrary oppressive. But, where a license fee is imposed er the police power, the fee exacted must not be so ge as to charge the ordinance with the imputation of evenue-producing purpose. The fee that may be osed under the police power is one that is sufficient to compensate the municipality for issuing the nse and for exercising a supervisory regulation r the subjects thereof.

also City of Georgetown v. *Morrison,* Ky., 362 S.W. 289 (1962); *Martin* v. *City of Louisville,* 312 Ky. , 227 S.W. 2d 435 (1950); *Daily* v. *City of Owens- o,* 257 Ky. 281, 77 S.W. 2d 939 (1934).

ummary, a license carries with it a regulatory func- d a license tax is a tax on the right to exercise a s privilege which is commonly regulated, carrying an exercise of the police power and supervision. upational tax is founded solely on the production of .

he court stated in *Sebree, supra,* ". . . The char- any tax is to be determined by its incidents and the y which it is described in the legislation imposing thout significance." The ordinance here in question

"Occupational Licenses." This being without
, we examine the ordinance itself. It purports
"an annual license fee" on "(a) all salaries,
missions or other compensation earned by every
he city for work done or services performed or
the city, and (b) the net profits of all busi-
fessions or occupations from activities conducted
"

no license issued, no certificate to be displayed,
ons imposed, no provisions for revocation of
nd the sole penalty provided is a fine for failure
file returns. The ordinance does provide for
l regulations for certain additional categories,
usements, dance halls, pool and billiard tables,
erchants, peddlers and solicitors, taxi cabs, col-
ncies, detective agencies, loan companies, pawn
me tables, firearm dealers, etc. Insurance com-
nestic servants, ordained ministers and church
are exempted.

er court apparently founded its exemption upon
concept, which, as we have pointed out, is an
concept. There was no threat herein, as envi-
the lower court, to the independence of the ju-
m as created under the Judicial Article and the
of Justice" concept therein. If this ordinance,
ner, sought to base its existence on the privilege
ts of this state to do business, sought to regu-
n any way, or threatened revocation of a priv-
nishment for noncompliance, this Court would
e to declare it invalid. However, this ordinance
revenue measure, imposing an occupational tax,
respect the judges of this Commonwealth are no
an the federal employees in the case of *Patrick*
Frankfort, Ky., 539 S. W. 2d 275 (1976).

, the courts have been careful to include the
in the category of other state employees or gen-
nry. In *Batesville Casket Co.* v. *Fields*, 288 Ky.
3. W. 2d 743 (1941), the court declared that a
ating to the attachment or garnishment of salar-
ployees of tate and local government applied to
lges. In *Martin* v. *Wolfford*, 269 Ky. 411, 107
267 (1937), the court held that the state income
d to judges despite a provision against decreas-
alaries during their term of office.

lding was placed in adequate perspective in the
ok v. *Commissioners of Sinking Fund of City of*
, 312 Ky. 1, 9, 226 S. W. 2d 328 (1950), when that
that the tax "is not a prerequisite to the right of
ver to perform his duties . . ." The court went
that "The taxes imposed to defray the costs in-
a local government in providing public facili-
[these] taxpayers, in common with other gain-
loyed persons in the City of Louisville, are per-
enjoy."

within our inherent power to give this decision
e application. *Lasher* v. *Commonwealth*, Ky.,
2d 416 (1967). To impose taxes now for previ-
would invoke undue hardship, especially in light
t that there was no previous published opinion
urts of Kentucky deciding the question. As a
fact, repeated inquiries to the Office of the At-
neral had consistently resulted in the dissemina-
case from the Franklin Circuit Court styled *City*
ort v. *Hill* which contained a seemingly contrary

lingly, this opinion shall have prospective ap-
only. ' *See German Gymnastic Ass'n Of Louisville*
Louisville, et al., 306 Ky. 810, 812; 209 S. W. 2d
, and cases cited thereunder.

rselves upon our own fiscal sword, we reverse
of the lower court.

., Concurs by Separate Opinion.
Dissents.

., Concurring. While I am no more anxious
on a fiscal sword than any other taxpayer, I
n Judge Gant's opinion. Long-standing and
erpretation of Section 181 of the Constitution
me Court and the public policy expressed by
lo not seem to permit a contrary result. Un-
nstitutional officers such as judges are not en-
er a "trade" or "profession" in the perform-
official functions. They are, however, engaged
ation." "Occupation" has been defined to en-
atever one follows as a means of making a
Benefit Association of Railway Employees v.
Ky. 400, 39 S. W. 2d 682, 684 (1931).

Appellant:

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TITES, II
AUM, DOLL & McDONALD
National Tower
entucky 40202

Appellees:

LOGAN
y Home Life Building
entucky 40202

APPENDIX C

FEBRUARY 27, 1981
TO BE PUBLISHED

ME COURT OF KENTUCKY

80-SC-123-DG

---

rson, Et Al. - - - - *Movants*

s of the Sinking Fund
y of Louisville - - - *Respondents*

---

n Review From Court of Appeals
78 CA-1240 MR
efferson Circuit Court No. 232242

NCURRING OPINION OF CHIEF JUSTICE PALMORE

se the court, after hearing oral arguments discretionary review, decided to vacate the ew because a majority of its members were the opinion of the Court of Appeals stand as e subsequent filing of a dissenting opinion, sions a further explanation of the majority

inning to end this controversy has been a ls. What is the occupational tax? Is it an a license tax? If it is a local income tax, ggests that it is not permitted by Sec. 181 of on. If it is truly a license tax, in the classical ot be applied to constitutional officers. If the money it is really an income tax. If it is on

the privilege of engaging in an occupation it is really a license tax. And so on. This type of reasoning can be carried on to the point of absurdity in just about any direction. See, for example, the classic fictional opinion of Regina v. Ojibway, reprinted by permission in Stevens v. City of Louisville, Ky., 511 S. W. 2d 228, 230-231 (1974). See also Fuller, the Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1948-49).

Fortunately, as Holmes put it, "The life of the law has not been logic: it has been experience." Holmes, *The Common Law* (Boston: Little, Brown and Company, 1881), p. 1. This case presents a graphic illustration of that eternal truth. Judge Irving R. Kaufman, of the U. S. Court of Appeals for the Second Circuit, recently commented to the effect that judges should possess "capacity in both the analytic and synthetic modes of thought: analytic because much of our work involves the parsing of statutes, the sifting of records, and the reconciliation of case law; synthetic because the highest form of the judge's craft involves the creation of an imaginative solution that sweeps away contradiction and ambiguity, advancing the law's true purpose within the bounds of precedent and reason." Irving R. Kaufman, "Charting a Judicial Pedigree," The New York Times, Jan. 24, 1981. We think the opinion of the Court of Appeals achieves that purpose in this case.

About as close as we can come to the truth of the matter is that the occupational tax is a tax on income, and probably would be illegal except for the fact that this court in City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248 (1948), saw fit to legalize it by the stratagem of calling it something else. Now, after more than 30 years in which the tax has become an indispensable mainstay not only to Louisville but to many other local governments, nobody in his right mind wants to overrule that case. Its purpose

was to permit this kind of taxation on the general public, and it seems quite improbable that it ever occurred to the members of the court who joined in the *Sebree* opinion that the right to levy such a tax would apply to everyone but judges and other constitutional officers.

The majority of the members of the court today believe that the opinion of the Court of Appeals is fundamentally correct, though we do not feel it necessary to find an appropriate label for the tax in order to reach that conclusion. It is enough that whatever it may be called, it was declared valid in 1948, and, as the opinion of the Court of Appeals observed, it does not any more impinge upon the right or privilege of constitutional officers to carry out their functions than it does upon the privilege of anyone else to earn a living. We think it would be grossly unfair to the public in general for us to seize upon technical grounds and declare that we or any other public officers are exempt from it.

Clayton, Stephens and Stephenson, JJ., join in this concurring opinion.

APPENDIX D

RENDERED: FEBRUARY 24, 1981
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

80-SC-123-DG

HENRY D. HOPSON, Et Al. - - - - *Movants*

v.

COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE - - - *Respondents*

On Review From Court of Appeals
78 CA-1240 MR
Jefferson Circuit Court No. 232242

DISSENTING OPINION BY JUSTICE LUKOWSKY

In my view the real question presented by this case is whether occupational license taxes may be levied upon persons for the "privilege" of executing offices created by the constitution of the Commonwealth to which they have been elected by the people. Such offices include at least Member of the General Assembly, Governor, Lieutenant Governor, State Treasurer, Auditor of Public Accounts, Commissioner of Agriculture, Secretary of State, Attorney General, Superintendent of Public Instruction, Railroad Commissioner, Justice and Judge of the Court of Justice, Commonwealth's Attorney, Circuit Clerk, County Judge, County Clerk, County Attorney, Sheriff, Jailer, Coroner, Justice of the Peace, Constable, County Commissioner, and Delegate to a Constitutional Convention.

A number of seemingly inconsistent observations may be made about occupational license taxes in Kentucky:

A. They are not income taxes. City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248 (1948).

B. They are not impermissible excise taxes. City of Lexington v. Motel Developers, Inc., Ky., 465 S. W. 2d 253 (1971).

C. They are not imposed as police power regulatory measures. See Martin v. City of Greenville, 312 Ky. 292, 227 S. W. 2d 435 (1950).

D. They are revenue measures. Martin, supra.

However, the bottom line is that they are no more and no less than taxes levied on the "privilege" of engaging in any occupation, business, trade or profession within the geographical boundary of the unit of government imposing the tax. Patrick v. City of Frankfort, Ky., 539 S. W. 2d 275 (1976); 2 Debates of the Constitutional Convention 2793 (1890).

Running for office is a right. Election to office is selection for public service by the ultimate repository of governmental power, the people. Execution of the office is fulfillment of a duty to the people. Consequently, there is no "privilege" here to tax.

When the drafters explored the scope of section 181 of the Constitution of Kentucky, they considered a myriad of occupations that might be taxed ranging from scavengers to bath-house keepers and back again, but we find nothing there to summon up so much as an ethereal spectre of legitimacy for taxation of the execution of elective constitutional office. 2 Debates of the Constitutional Convention 2688 et seq. (1890). Silence on the point in the hurly-burly of robust debate can mean nothing but that the idea was beyond the pale, and any cry of unconstitutional inequality is smothered when we remember that our constitution con-

templates exclusive and separate rewards and penalties for public service. Ky. Const. sections 3 and 19 (1891).

I would retain the case on the docket and answer the question in the negative, thereby reversing the decision of the Court of Appeals and affirming the judgment of the Jefferson Circuit Court.

I am authorized to state that Sternberg, J., joins in this dissent.

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APPENDIX E

TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

80-SC-123-DG

HON. HENRY D. HOPSON, Et Al. - - - *Movants*

v.

COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE - - - *Respondents*

On Review From Court of Appeals
78 CA-1240 MR
Jefferson Circuit Court No. 232242

OPINION AND ORDER

The court, having considered the briefs of movants and respondents, and having heard oral argument for parties in this matter, is of the opinion that discretionary review was improvidently granted.

This court's order granting discretionary review is vacated and the case is remanded to the Court of Appeals for the issuance of its mandate.

Palmore, C.J., Clayton, Stephens, and Stephenson, JJ., concur. Lukowsky and Sternberg, JJ., dissent.

ENTERED February 17, 1981.

/s/ John S. Palmore
Chief Justice

Movant:

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ERT T. COMBS
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Respondent:

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Office-Supreme Court, U.S.
FILED
JUN 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1973

PREME COURT OF THE UNITED STATES

October Term, 1980

NRY D. HOPSON, JUDGE, et al. - - Petitioners

versus

MMISSIONERS OF THE SINKING FUND
OF THE CITY OF LOUISVILLE - - Respondent

On Petition for a Writ of Certiorari to the
Court of Appeals of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT F. MATTHEWS
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e 12, 1981

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3281, LOUISVILLE, KY.

QUESTION PRESENTED

ıny federal question presented for review, and if so, properly raised below, in this case, in which the cky appellate courts have held that the State's judges ferson County must pay certain local taxes in the manner as virtually all other individuals and all sses in the County and the City of Louisville?

TABLE OF CONTENTS

	PAGE
Presented	i
Contents	ii
Authorities	iii
Below	1
t of the Case	2– 5
of Argument	5
Why the Writ Should Be Denied	5–12
o Substantial Federal Question Presented	5– 7
o Federal Question Raised Below	7– 8
ase Properly Decided Below and Not Worthy f Review By This Court	9–12
on	13

TABLE OF AUTHORITIES

	PAGE
nal Provisions:	
tates Constitution, Fourteenth Amendment	6
Constitution, §§ 109-124, § 181	6
tutes:	
(4 U.S.C. § 104 *et seq.*)	4, 10
§ 5520	5
§ 1257	6, 7
Revised Statutes ("KRS"):	
180	9
090	4
130	2
200	2– 3
e v. *Louisiana*, 394 U. S. 437 (1969)	8
Beneficial Industrial Loan Corp., 337 U. S. 1949)	7
v. *Commissioners of Sinking Fund*, 344 624 (1953)	4, 10
Lexington v. *Motel Developers, Inc.*, 465 2d 253 (Ky. 1971)	10
Louisville v. *Sebree*, 308 Ky. 420, 214 S. W. 3 (1943)	9
. *Wolfford*, 269 Ky. 411, 107 S. W. 2d 267)	12
rchison, 349 U. S. 133 (1955)	7
v. *Woodrough*, 307 U. S. 277 (1939)	12
. *City of Frankfort*, 539 S. W. 2d 275 (Ky.	10
New York, 394 U. S. 576 (1969)	8
Arizona, 410 U. S. 351 (1973)	8
preme Court Rule 21	8
ous:	
le Codified General Ordinances, § 727.08	4

COURT OF THE UNITED STATES

October Term, 1980

No. 80-1973

IOPSON, JUDGE, et al. - - *Petitioners*

ERS OF THE SINKING FUND
TY OF LOUISVILLE - - - *Respondent*

TION FOR A WRIT OF CERTIORARI TO THE
OURT OF APPEALS OF KENTUCKY

ONDENT'S BRIEF IN OPPOSITION

---

ondent, the Commissioners of the Sinking
City of Louisville, respectfully requests
urt deny the Petition for Writ of Cer-
ng review of the decision of the Kentucky
peals in this case.

OPINIONS BELOW

ion of the Court of Appeals of Kentucky
vas handed down on January 18, 1980 and
t 613 S. W. 2d 621. On February 17, 1981,
Court of Kentucky entered an Opinion
n which the Court vacated its previous
ng discretionary review in this case. This
Order, together with a concurring opinion
ting opinion, is reported at 613 S. W. 2d

STATEMENT OF THE CASE

of Louisville and Jefferson County (of
ville is the county seat) levy four general
license taxes, namely the Louisville occu-
nse tax, the Jefferson County occupational
he occupational license tax for schools and
nsit occupational license tax. All of these
llected on behalf of the City and County
ondent, which is a public corporate body
er the provisions of KRS 91.130 *et seq.*
occupational taxes are each authorized by
ate statute, all of which are of similar con-
example of one such statute, KRS 91.200,
rized the Louisville license tax, provides in
ows:

00. *City license taxes — Imposition — - Collection — Transfer of surplus to gen- nd — Use — Restriction on ad valorem tax king fund purposes — Issuance and en- ent of licenses.* — (1) The board of alder- every city of the first class, in addition to ad valorem taxes, may by ordinance impose fees on franchises, provide for licensing siness, trade, occupation or profession . . . e fees on a business, trade, occupation or sion for revenue purposes may be imposed ercentage rate not to exceed those herein- et forth on (a) salaries, wages, commissions her compensations earned by every person the city for work done and services per- d or rendered in the city, (all of such being after collectively referred to as "wages"),

and (b) the net profits of all businesses, professions or occupations from activities conducted in the city (hereinafter collectively referred to as "net profits"). Licenses imposed for regulatory purposes shall not be subject to such limitations as to form and amount. . . .

(2) The rate fixed on both "wages" and "net profits" shall be one and one-fourth per cent (1¼%).

(3) License fees or taxes shall be collected by the commissioners of the sinking fund. The proceeds from the taxes shall be paid to the secretary and treasurer of the sinking fund until income from all sources of the sinking fund is sufficient to pay the cost of administration and the interest charges for the current fiscal year of the sinking fund in addition to a sum sufficient to amortize the outstanding principal indebtedness of the city on a yearly basis in accordance with regularly used amortization tables.

(4) Revenue remaining after meeting the foregoing requirements shall be transferred to the city. Such revenues shall be credited to the general fund of the city as received and may be expended for general purposes or for capital improvements.

. . .

(7) Licenses shall be issued and enforced on terms and conditions as prescribed by ordinance.

The four occupational license taxes are at present imposed throughout Jefferson County at a combined, level rate of 2.2% of (a) the gross wages and salaries paid to individuals employed by others in the County

and (b) the net income earned within the County by businesses and self-employed persons. The occupational license taxes are the leading source of revenue for local government in Jefferson County.

Inasmuch as the Petitioners are salaried officials of the Commonwealth, the occupational license taxes which they owe would be withheld from their judicial salaries and paid over to the Respondent by the State Finance Department. Contrary to their Petition to this Court, the Petitioners would not be required to register with the Respondent or to file occupational license tax returns. These requirements are applicable only to businesses and self-employed individuals. See §727.08 of the Louisville Codified General Ordinances, concerning the registration requirement, which is quoted on Page 11 of the Petition.

Municipalities in Kentucky are explicitly authorized by KRS 82.090 to impose occupational license taxes on state officers and employees, which would include judges, in the same manner as such taxes are generally imposed on others working within their boundaries. Accordingly, the occupational license taxes at issue in this case are presently withheld by the Commonwealth from all other state officers and employees working in Louisville and Jefferson County and paid over to the Respondent.

Similarly, under the Buck Act (4 U.S.C. §104 *et seq.*) and this Court's decision in *Howard* v. *Commissioners of Sinking Fund,* 344 U. S. 624 (1953), all federal employees in Jefferson County, including presumably the U. S. District Judges sitting in Louisville,

are obligated to pay the occupational license taxes. These taxes are withheld from federal employees and remitted to the Respondent by the Treasury Department and other federal agencies in accordance with 5 U.S.C. §5520.

SUMMARY OF ARGUMENT

The Petitioners are asking this Court to overrule the Kentucky appellate courts in their interpretation of the Kentucky Constitution. This request is beyond the jurisdiction of this Court to grant and does not raise a federal question.

This case was argued and decided below entirely on the basis of Kentucky law. No federal question was raised by either side before the Kentucky appellate courts, nor was any federal question passed on by either Kentucky appellate court. This Court will not consider federal questions not properly raised in state court proceedings below.

The Kentucky courts correctly held that judges should pay the same taxes in the same manner as other citizens and that their judicial independence would not be threatened by doing so. No issue in this case merits consideration by this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I. No Substantial Federal Question Presented.

As their sole federal issue, the Petitioners assert that the imposition on them of the local taxes at issue in this case would constitute a violation of their rights

under the Fourteenth Amendment, thereby giving this Court jurisdiction over the case under 28 U.S.C. §1257(3). To briefly state their position, the Petitioners argue that Louisville and Jefferson County are without authority under the *Kentucky* Constitution to levy the general occupational license taxes on their judicial compensation. Therefore, they claim, the efforts of the City and County to collect these taxes from them constitutes a taking of their property in violation of their rights under the Due Process Clause of the Fourteenth Amendment.

The position of Petitioners is on its face without merit because the Kentucky appellate courts have explicitly found that Louisville and Jefferson County are empowered under the Kentucky Constitution to levy the occupational license taxes on the Petitioners. As a review of the briefs will demonstrate, this precise issue was argued to all three Kentucky courts below, leading the State Court of Appeals to hold imposition of the taxes on Petitioners valid under §181 of the Kentucky Constitution and to pose "no threat . . . as envisioned by the lower court, to the independence of the judicial system as created under the Judicial Article [of the Kentucky Constitution]." 613 S. W. 2d at 624. A majority of the Justices of the Kentucky Supreme Court, in their concurring opinion explaining the court's order dismissing the Petitioners' appeal, indicated that they had taken such action because they believed the decision of the Court of Appeals to be correct.

It is, of course, well established law that the appellate courts of a state are the ultimate arbiters as to whether a state statute or local ordinance is valid under the constitution of that state. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). This Court is bound by the holding of the Kentucky courts that Louisville and Jefferson County may validly under the Kentucky Constitution impose their general occupational license taxes on the Petitioners. *In re Murchison*, 349 U. S. 133 (1955). Accordingly, the only supposed federal question explicitly asserted by the Petitioners is not an issue subject to review by this Court.

While they never specifically articulate it, the Petitioners are perhaps seeking to raise a second federal question in the course of their lengthy and otherwise irrelevant discussion regarding judicial independence. As best as Respondent can discern from the Petition, this supposed second issue runs as follows: If Louisville and Jefferon County are permitted to exact the local taxes at issue from Petitioners, their independent and impartial status as judges will be imperiled, resulting in a violation of the right of litigants before them to a fair trial under the Due Process Clause of the Fourteenth Amendment. Even if Petitioners have standing to raise this issue, it is not a proper question for the Court to consider for the reasons set forth below in this Brief.

II. No Federal Question Raised Below.

An essential requirement to invoking this Court's jurisdiction under 28 U.S.C. §1257 is that a substantial

Federal question has been properly raised in the state court proceedings below. The Petitioners have totally failed to satisfy this requirement. This failure, perhaps, explains why the Petitioners have also failed to comply with Rule 21.1(h) of this Court. Pursuant to this rule, a Petition for Certiorari, where review of a state court judgment is sought as in this case, must specify at what stages and in what manner the federal questions for which review by this Court is sought were raised in the state court proceedings and also indicate the way in which such questions were passed upon by the state courts.

Nowhere in any of the briefs for either side to the Kentucky Court of Appeals or to the Kentucky Supreme Court is the Fourteenth Amendment mentioned or any federal question raised. Nowhere in any of the opinions of the Kentucky Court of Appeals or Supreme Court is the Fourteenth Amendment cited or reference made to any federal question, thereby giving rise to a presumption that no federal question was presented to the Kentucky courts. *Street* v. *New York*, 394 U. S. 576 (1969).

In point of fact, this case was argued and decided below entirely on the basis of the State Constitution and other law of Kentucky. This Court, therefore, is without jurisdiction to hear this case. *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969). This Court will not decide issues which are raised on review of state court proceedings for the first time before this Court. *Tacon* v. *Arizona*, 410 U. S. 351 (1973).

III. Case Properly Decided Below and Not Worthy of Review by This Court.

Seizing upon the theoretical framework of the taxes here at issue and the word "license" appearing in their name, the Petitioners argue at length to this Court that if the Respondent has the authority to "license" them, then the Respondent must necessarily have the power to regulate their judicial functions, and that, therefore, their judicial independence and impartiality are imperiled. As both Kentucky appellate courts concluded, this argument is without merit.

The Petitioners overlook the well-established distinction between license taxes levied to raise revenue under the taxing power and license taxes and fees imposed as part of a regulatory scheme under the police power. The Kentucky statute authorizing the Louisville license tax, which is quoted hereinabove, and the similar statute, KRS 68.180, authorizing the County license tax, both expressly provide that such taxes shall be "for revenue purposes". The other two taxes, the schools and the mass transit license taxes, patently serve only to raise funds for county schools and the local bus system. The State Court of Appeals founded its decision below on its conclusion that the taxes at issue here are purely revenue measures, relying in part on *City of Louisville* v. *Sebree,* 308 Ky. 420, 214 S. W. 2d 248 (1948), in which Kentucky's highest court similarly held the Louisville occupational license tax to be solely a revenue measure.

In keeping with the revenue purpose of the taxes in issue, no regulation of any nature is imposed through

incidental to them. As the Kentucky Court of peals found,

> "There is no license issued, no certificate to be displayed, no regulations imposed, no provisions for revocation of privilege, and the sole penalty provided is a fine for failure to properly file returns." 613 S. W. 2d at 624.

the Petitioners are found liable for occupational ense taxes, the State of Kentucky will begin with- lding such taxes from the Petitioners' judicial laries and remitting them to the Respondent. No tion of any kind on the part of the Petitioners will necessary, nor will the Respondent take any further tion regarding the matter.

To reach the heart of this issue, the taxes here in spute are essentially nothing more than local income xes. Provisions of the Kentucky Constitution, how- er, prohibit the taxes from being characterized as ch, necessitating the general occupational license tax bel and framework. The Kentucky appellate courts, evertheless, have long recognized the true nature of ese taxes. See the concurring opinion in the Ken- cky Supreme Court below and the concurring opin- ns in *Patrick* v. *City of Frankfort,* 539 S. W. 2d 275 Ky. 1976), and *City of Lexington* v. *Motel Developers, nc.,* 465 S. W. 2d 253 (Ky. 1971). Similarly, in *Howard* v. *Commissioners of the Sinking Fund,* 344 J. S. 624 (1953), this Court found the Louisville oc- upational license tax to be an income tax within the eaning of the Buck Act (4 U.S.C. §104 *et seq.*).

As broad based general revenue measures, levied almost all businesses and persons working in Louisville and Jefferson County, the taxes at issue in this case are without regulatory purpose and do not afford any means by which the Respondent or local government could in any way threaten the independence or impartiality of Kentucky's judiciary. The Court of Appeals stated below, 613 S. W. 2d at 624, that it would not hesitate to declare . . . invalid" the license taxes if they were ever used for such a purpose. There is no reason for this Court not to leave to the Kentucky appellate courts the protection of the state rights in Jefferson County.

Of all citizens, judges should be among the first to shoulder their fair share of supporting local government and schools. As Justice Frankfurter wrote for this Court in upholding a statute imposing the federal income tax on federal judges taking office after a certain date:

> To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article 3, §1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution

laws they are charged with administering. *alley* v. *Woodrough*, 307 U. S. 277, 282 (1939).

to *O'Malley*, Kentucky's highest court had reached the same conclusion in *Martin* v. *Wolf*- 9 Ky. 411, 107 S. W. 2d 267 (1937), in which rt held the Commonwealth's judges to be r the state income tax immediately upon its nt.

hort, this case was correctly decided below and y merits review by this Court.

CONCLUSION

the foregoing reasons, the Petition for Writ iorari in this case should be denied.

Respectfully submitted,

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COURT OF THE UNITED STATES

October Term 1980

No. 80-1973

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RD C. OLDHAM
LES H. ANDERSON
H NICHOLSON and
E H. KUNZMAN - - Petitioners

IERS OF THE SINKING FUND
ITY OF LOUISVILLE - Respondent

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etition for a Writ of Certiorari to the
Court of Appeals of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

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COURT OF THE UNITED STATES

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S OF THE SINKING FUND
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ON FOR A WRIT OF CERTIORARI TO THE
URT OF APPEALS OF KENTUCKY

ESPONDENT'S BRIEF IN OPPOSITION

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ondent has raised several arguments in
pposition which merit reply:
pondent suggests that there is no substan-
estion presented and that "it is, of course,
ed law that the appellate courts of the
ltimate arbiters as to whether a state stat-
dinance is valid under the constitution of
ohen v. *Beneficial Industrial Loan Corp.*,
(1949). Furthermore, Respondent sug-
his court is bound by the holding of the
rts that Louisville and Jefferson County
under the Kentucky constitution impose

their general occupational license taxes on the Petitioners." [Respondent's Brief, p. 7.]

We submit that this Court is not bound by the holding of the Kentucky courts since the tax imposed by General Ordinance No. 727 amounts to a taking of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. While it is true that a state appellate court is the ultimate arbiter as to whether or not a state or local ordinance is valid under the constitution of that state, it is also true that federal constitutional questions must be considered by this Court.

> Federal constitutional questions we must consider, because a federal court would not give effect, in either a diversity or non-diversity case, to a state statute that violates the Constitution of the United States. *Cohen, Id.,* at 337 U. S. 547.

Secondly, Respondent suggests that this Court is without jurisdiction to hear this case since no federal questions were properly raised in the state court proceedings below. "This court will not decide issues which are raised on review of state court proceedings for the first time before this court. *Tacon* v. *Arizona,* 410 U. S. 351 (1973)." [Respondent's Brief, p. 8]

We submit that the due process question was properly raised in all of the state courts below since it has been our contention from the outset that the Respondent is without authority to impose an occupation or license tax on the Petitioner's constitutionally mandated job of conducting circuit court in their city. The exaction of this tax is a taking of property without

due process of law in violation of the Fourteenth Amendment of the United States Constitution. This Court has long recognized that no particular form of words or phrases is essential to draw in question the constitutionality of a state's statute.

> Insofar as the question of sufficient presentation is one for independent decision, the controlling principle was set forth in a leading case of *New York ex rel, Bryant* v. *Zimmerman,* 278 U. S. 63, 67, 73 L. Ed. 184, 187, 49 S. Ct. 61, 62 A.L.R. 785 (1928);
>
> "There are various ways in which the validity of a state statute may be drawn in question on the grounds that it is repugnant to the Constitution of the United States. *No particular form of words or phrases is essential,* but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. *And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.*" [Emphasis added.] *Street* v. *New York,* 394 U. S. 576, 584, 22 L. Ed. 2d 572, 580, 89 S. Ct. 1354 (1969).

It cannot be doubted from the record as a whole that the clear intendment of the Petitioners' argument is that the tax imposed by General Ordinance 727 is violative of the Petitioner's right to due process of law since it places a tax on the privilege of engaging in an occupation which has been constitutionally mandated by the Commonwealth of Kentucky. Thus, the issue

of due process of law was properly raised in the courts below.

We submit that this Court could still maintain jurisdiction even if the constitutional issue had not been properly raised in the courts below. This Court has long recognized the principle that a reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. *United Brotherhood* v. *United States,* 330 U. S. 395, 91 L. Ed. 973, 67 S. Ct. 775 (1947). This court makes exceptions to its rule against consideration of questions not raised by the parties in view of the *importance of the question involved* or of *public concern,* or *in the interest of justice.* See *United States* v. *Western P.R. Co.,* 352 U. S. 59, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956), *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 28 L. Ed. 2d 788, 91 S. Ct. 1434 (1971). We submit that this case is of a continuing public concern since the issues involved affect the very independence of the judiciary system. It is, therefore, within this Court's authority to consider the due process of law question even if it had not been raised in the lower courts.

Finally, Respondent suggests that "of all citizens, judges should be among the first to shoulder their fair share of supporting local government and schools." [Respondent's Brief in Opposition, p. 11.] As authority for this principle the Respondent cites *Martin* v. *Wolford,* 269 Ky. 411, 107 S. W. 2d 267 (1937) and a dissertation by Justice Frankfurter in *O'Malley* v.

Woodrough, 307 U. S. 277 (1939) concerning this Court's decision to uphold a state statute imposing federal income tax on federal judges.

We submit that the Respondent has erroneously attempted to akin the payment of an occupational license tax to the constitutional duty to pay income tax. Petitioners agree that they should shoulder their fair share of support for local government and schools by paying state income tax. Petitioners have never argued that they should not pay state or federal income tax. Petitioners are simply stating that they should not have to pay an occupational or license tax for the privilege of engaging in an occupation that has been mandated by the Constitution of the Commonwealth of Kentucky. Payment of income tax has absolutely nothing to do with this case and, hence, Respondent's reliance upon *O'Malley* and *Martin* is misplaced.

In conclusion, Petitioners respectfully request this Court to grant the Writ of Certiorari in order to resolve an issue of great public concern to both the citizens and the Judiciary of the Commonwealth of Kentucky.

Respectfully submitted,

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